Common Ownership and Its Competitive Impact: Is It Real and What’s at Stake?

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IN A SERIES OF RECENT STATEMENTS, speeches, and public hearings, the U.S. antitrust agencies have made it clear that they are studying the potential competitive impact of “common ownership,” where a single investor simultaneously owns non-controlling interests in competing companies. While common ownership is not new—heavily diversified investors have long mitigated risk through broad holdings, even within a single industry—recent academic studies claim there is empirical proof that common ownership leads to reduced competition, higher prices, and a need for antitrust regulators to act.

These studies come at a time of significant concentration among stockholders. Institutional investors, which include “mutual fund and index fund management companies, other asset managers, and other firms that buy and hold equities on behalf of individual investors,” 1 collectively hold a huge portion of the stock market. John Bogle, founder of the Vanguard Group and often described as the “father of index investing,” 2 warned that three index funds may soon “own more than 30% of the stock market,” a development he claimed “would [not] serve the national interest.” 2 Other estimates indicate that three institutional investors—BlackRock, Vanguard, and State Street—are the largest shareholders in 88 percent of S&P 500 firms. 3 When looking at the S&P 1,500, there is a 90 percent probability that two randomly selected firms from the same industry will have a common shareholder that holds at least 5 percent of both firms. 4 Nationally, “The fraction of U.S. public firms held by institutional investors that simultaneously hold at least 5% of the common equity of other same-industry firms has increased from below 10% in 1980 to about 60% in 2014.” 5

There is no indication that this phenomenon will abate, 6 leading some critics to claim common ownership is an “economic blockbuster” 7 and “the major new antitrust challenge of our time.” 8 Yet critics of common ownership admit that sweeping prohibitions against the practice would challenge “the basic structure of the financial sector” 9 and could undermine the low-cost, diversified investments on which many Americans lean for education and retirement saving. 10 Government officials—including leaders from the Federal Trade Commission, the Department of Justice, and the Securities and Exchange Commission—consequently have urged caution when considering enforcement action or policy change. They are reluctant to condemn investing practices that are both “ubiquitous” and a “reality of the modern economy” without understanding how common ownership impacts competition across a range of industries, how specifically it causes harm, and how those harms compare to the procompetitive benefits of institutional investment. 11

Even if immediate regulatory action against common ownership is unlikely, the proposals for how to deal with it are the subject of fierce academic debate. Given the importance of the common ownership issue to capital markets, ordinary investors, and antitrust reform more generally, we believe it warrants broad and regular attention. We consequently recount the still-developing discussion around common ownership and the regulatory reactions to it. We conclude with an illustrative look at stock holdings in a range of industries. The data underscores in stark terms the scope of common ownership across markets, from high technology to heavy industry and from health insurance to household goods. Visualizing stock holdings in this way demonstrates why advocates feel strongly that common ownership is a problem, and why any rash actions would have serious implications for the economy.

The Common Ownership Debate

Arguments Driving the Common Ownership Conversation. The current debate over common ownership can largely be traced to two academic papers claiming that the practice leads to higher consumer prices. The first paper focused on the airline industry and concluded that common ownership increases U.S. airline ticket prices by 3 to 7 per-
The second paper looked at the banking industry and found that common ownership is strongly correlated with higher account maintenance fees and deposit thresholds.  

Subsequent papers have examined other industries and trends. One estimate that there is a correlation between common ownership and executive compensation that weakens incentives for aggressive competition. Another finds that common ownership is “positively associated with the likelihood” that a brand-name pharmaceutical company will enter a reverse-payment settlement—whereby it, as the plaintiff in patent litigation, pays a generic-manufacturer to delay generic entry into the market. A third paper notes that the pricing effects of common ownership in the ready-to-eat cereal market “would be larger than those from any possible 4-to-3 merger in the industry,” which “implies that the common ownership incentives may in fact be very strong, even if firms do not seem to respond to them in that context.”

Accepting these economic conclusions, some legal commentators have argued that common ownership should be condemned under Clayton Act Section 7, which prohibits the acquisition, “directly or indirectly, [of] the whole or any part of the stock” of a company when the “effect of such acquisition may be substantially to lessen competition.” They explain that the statute “was created precisely to address stock acquisitions that create anticompetitive market structures,” rendering its “application to horizontal shareholdings . . . quite straightforward.” Specifically, common ownership does not generate any “off-setting integrative efficiencies” and is “quite parallel to the accepted point that one firm’s acquisition of a non-controlling interest in a rival can be illegal (even when passive).” Under this proposed approach, the statute’s passive investor exception does not apply if the stock acquisition actually lessens competition.

Opponents of common ownership also contend that it can be challenged under Sherman Act Section 1, which prohibits all contracts, combinations, or conspiracies in restraint of trade. They claim that a less restrictive alternative is available under the rule of reason—namely, prohibiting horizontal shareholding by institutional investors while allowing individuals to diversify through multiple asset managers. In light of these theories, commentators have proposed structural remedies ranging from divestiture to a prohibition on any common investor holding more than 1 percent of the aggregate equity in a concentrated industry.

**Counter Arguments.** These economic findings and legal recommendations are the subject of fierce scrutiny from critics, who raise a number of arguments against government intervention. First, critics contend that there is no proven mechanism through which common shareholders actually lessen competition, a proposition that some proponents of government intervention admit. This means: (1) the relevant studies may be attributing to common ownership price effects caused by any number of other causes; and (2) there is “little empirical evidence on which a court could rely to find antitrust liability and to reorganize the asset management industry.” Relatedly, some commentators have explained that any relationship between common ownership and higher prices is dependent on considerations like industry-specific market conditions, shareholder incentives, and management objectives, which means that any anticompetitive effects must be proven on a case-by-case basis and no economy-wide conclusions can be drawn.

Second, much of the literature on common ownership “treat[s] all shares managed by any investment manager as ‘owned’ by that manager for antitrust purposes.” In reality, an investment manager is generally the nominal owner. It holds shares as a fiduciary for the underlying economic owners, who may vote their own shares and may have divergent interests, which can keep the institutional investor from acting “monolithically” in any industry. Institutional investors, moreover, often hold interests in firms outside the relevant industry. Those firms—as downstream customers or upstream suppliers—would be impacted by any anticompetitive conduct in the relevant market, which “makes it impossible to generalize that vigorous competition necessarily harms investment managers.”

Third, critics contend that the legal theory around common ownership represents a “novel” and “dubious” application of the law because “there is no clear legal basis for antitrust liability under either § 7 of the Clayton Act or under § 1 of the Sherman Act.” They argue that “essentially all § 7 precedents address [a discrete type of factual circumstance] whereas common ownership presents a different fact pattern and involves different economic principles.” With respect to Section 1, critics claim there is no “intelligible limiting principle by which to distinguish lawful from unlawful stock ownership” for purposes of a less restrictive alternative under the rule of reason.

Fourth, many economists question the underlying conclusions supporting common ownership theory and advance divergent econometric findings. One study, for instance, concluded that “common ownership is neither robustly positively related with industry profitability and output prices nor robustly negatively related with measures of non-price competition,” as one would expect if common ownership led to reduced competition. A second paper found mixed and muted evidence of any competitive impact on the banking industry. And a third claimed that common ownership does not increase prices in the airline industry.

Finally, institutional investors have defended their investment practices. BlackRock, for instance, contends that the common ownership debate “seek[s] to fix a problem that does not exist” and that any remedies aimed at common ownership are “recklessly advance[d]” because they “would have concrete and wide-ranging harm on everyday investors and the economy as a whole.” BlackRock advanced is own econometric results suggesting that the initial common ownership literature was based on flawed assumptions and does not hold up under scrutiny. Separately, the owner of the S&P 500 has noted that airlines—the subject of the seminal
paper on common ownership—accounted for a small fraction (0.5 percent) of the float-adjusted market capitalization of the S&P 500 at the end of 2018, raising the question why institutional investors would cause airline executives to raise prices if doing so would lead to higher costs for the other 99.5 percent of companies on the S&P 500.39

Agency Perspectives
In light of this active and vociferous debate, the U.S. antitrust agencies have taken note and started to weigh in. Perhaps the most authoritative statement from the government came in November 2017, when the Department of Justice and the Federal Trade Commission submitted a joint statement about common ownership to the Organization for Economic Cooperation and Development. That statement made clear that the government thought “the empirical literature on the competitive implications of common ownership by institutional investors is still in its early stages” and that they were “not prepared at that time to make any changes to their policies or practices.”40 They explained that “any antitrust enforcement or policy effort in this area should be pursued only if an inquiry reveals compelling evidence of the anticompetitive effects,” which would “not be predicated on general relationships suggested by academic papers.”41 Any other approach—including “across-the-board limitations on common ownership without sufficient evidence of anticompetitive effects”—could impose unintended real-world costs on businesses and consumers by making it more difficult to diversify risk.42

Both the DOJ and FTC continue to study the phenomenon, however, and have made a number of statements that provide additional insight into what they consider the key issues in the common ownership debate.

DOJ. In early 2016, William Baer, then-Assistant Attorney General for Antitrust, told Congress that the DOJ is “looking at” the “common ownership issue . . . in more than one industry.”43 Makan Delrahim, the current Assistant Attorney General for Antitrust, reiterated the same point in May 2019, noting the DOJ’s “interest” in common ownership, particularly “[w]hether antitrust enforcers should evaluate the effects of common ownership using existing measures, or use new approaches.”44 He noted, however, that “concerns about common ownership need to be rooted in theories of harm that can be proven in a court of law. So while [the DOJ] encourage[s] people to think creatively about these issues, remember that the Antitrust Division brings cases when we can prove that certain actions harm competition.”45 Relatedly, Delrahim made clear that the DOJ does not want to “inadvertently harm the capital markets” through enforcement actions because the “world of finance is a great example of how markets can expand choice for consumers via innovation.”46 Still, to the extent institutional investors “coordinate conduct between competing firms in which they have investments,” they would risk liability under Section 1 of the Sherman Act: “if an institutional investor has an ownership interest in multiple competitors, and its investment manager calls those competitors and discourages them from entering into price wars, there is a thin line, if any, between common ownership and collusion that violates Section 1.”47

FTC. In June 2018, Noah Phillips discussed common ownership during his first public remarks as an FTC Commissioner. He indicated that while the topic is “important,” antitrust enforcers must “tread carefully” because they do not “know enough to warrant policy changes.”48 Specifically, Commissioner Phillips noted that enforcers “need more information about other industries [beyond airlines and banking] to draw conclusions about how common ownership might affect competition across the economy as a whole.”49 They also require evidence identifying “a clear mechanism by which common shareholding actually causes a lessening of competition.”50 These uncertainties matter, Commissioner Phillips explained, because “[c]ommon ownership is a reality of today’s economy” and because there is no indication that large institutional investors are: (1) “at the apex of a massive antitrust conspiracy”; (2) “encouraging portfolio companies to lighten up on competition”; (3) “eliciting from [portfolio companies] confidential information which then is shared with other portfolio companies”; or (4) consulting with corporate managers about whether and how not to compete with rivals.51 Commissioner Phillips suggested that, at least for now, the common ownership “blockbuster” may be “a little light on plot.”52

In December 2018, the FTC revisited common ownership as part of its Hearings on Competition and Consumer Protection in the 21st Century, during which it heard from economists on both sides of the common ownership debate, as well as from enforcers, market participants, and practitioners.53 In opening remarks, Commissioner Phillips once again urged caution. He explained that common ownership “is a reality of the modern economy,” and that “rectonic policy shifts should not be undertaken lightly.”54 He identified four areas of research that need further development “before shifting policy on common ownership”: (1) how common ownership impacts a broad set of industries; (2) the precise mechanism through which common ownership purportedly harms competition, which is “critical to developing a coherent legal theory of antitrust harm, and ultimately to crafting an appropriate remedy”; (3) why company employees would put the interest of certain minority shareholders above other shareholders; and (4) how potential anticompetitive harms compare to the benefits of institutional investment.55 On the last point, Commissioner Phillips emphasized that “[l]arge institutional investors have, in many ways, made investing affordable for the average American” and that any enforcement in this area could upend the financial sector.56

SEC. Former SEC Commissioner Robert Jackson also spoke at the FTC’s common ownership hearing. Like Commissioner Phillips, Commissioner Jackson praised the economists who first identified common ownership as a potential competition concern but called for caution when consider-
ing enforcement and policy changes. He explained that he worries “that the evidence we have today may not carry the heavy burden that, as a Commissioner sworn to protect investors, [he] would require to impose costly limitations on diversified investments that American families count on to fund their education and retirement.” Accordingly, Commissioner Jackson made clear that “we’re at the beginning, rather than the end, of the academic debate about concentrated common ownership”—the papers raising concerns about common ownership “provide policymakers with more questions than answers.”

**What Is at Stake**

While the academic debate about common ownership initially focused on the airline and banking industries, the phenomenon is much broader. The S&P Dow Jones Indices, which owns the S&P 500 index and the Dow Jones Industrial Average, has explained that there “are 71 industries in the Global Industrial Classification Standard taxonomy, and all of them are equally subject to the effects of common ownership by index funds.” This fact raises important questions about what is at stake. How does common ownership look across industries? Are there any noteworthy trends, commonalities, or divergences?

We take no position here on whether common ownership actually leads to anticompetitive effects, generally or in a particular industry. Rather, by examining an illustrative snapshot of stock holdings across a range of industries, we seek to amplify two important themes that surround the common ownership debate: (1) the prevalence of concentrated stock holdings, and (2) how regulatory action prohibiting common ownership would impact nearly every industry and nearly every major company therein.

Given the illustrative and non-scientific nature of this discussion, we identified industries and competitors with which ordinary consumers likely are familiar, ranging from health insurance to hotels and from gas to household goods. We then looked at who held the stock of each issuer, as reported by S&P Capital IQ. If not surprising, the results are illuminating. Indeed, even when limiting ourselves to five competitors and their top ten shareholders, it is much easier to call out the firms that are not common shareholders than it is to identify common investors. The number of non-common shareholders would decrease even further if we expanded the number of competitors or looked past the top ten shareholders. Our full results appear in industry tables that can be found in the online Appendix to this article.

With these caveats and explanations—and again acknowledging that many of these firms “own” shares as fiduciaries for individual investors—there are at least three observations worth highlighting about the scope and nature of the common ownership phenomenon.

First, commonality can be extreme. In the market for household staples, for example, each competitor at which we looked—Proctor & Gamble, Colgate-Palmolive, Clorox, Kimberly-Clark, and Church & Dwight—had identical top-three shareholders: Vanguard, BlackRock, and State Street, in that order. There was, moreover, very little variation—competitor to competitor—in any of the top-three shareholder’s percentage of holdings. And each held a percentage of shares that was generally double (or more) those held by the fourth-largest shareholder. Even when such perfect symmetry is lacking, commonality still predominates. Each of the health insurers at which we looked—Aetna, Anthem, Cigna, Humana, and UnitedHealth—had top five shareholders which were also top shareholders in competitors, generally in their top five as well. Aetna, Cigna, and UnitedHealth had only one top ten shareholder that was not a top ten shareholder in a competitor. The insurers collectively had almost no unique shareholders.

Second, while common shareholders own non-controlling interests, their holdings can still top 10 percent—in some instances by a lot. This is potentially significant because the FTC’s former Bureau of Competition Director Bruce Hoffman described “double digits” shareholding as a “reasonably substantial” stake when assessing “competitive issues.” A selection of the “substantial” shareholding we encountered includes:

- Capital Research and Management Company holds 22 percent and 17 percent of mining companies Alcoa and Vale, respectively. It also holds a top four percentage of competitors Rio Tinto and BHP Group.
- Vanguard holds roughly 12 percent of household good competitors Clorox and Church & Dwight, while holding the largest percentage of shares (between 8.2 and 9 percent) in Proctor & Gamble, Colgate-Palmolive, and Kimberly-Clark.
- T. Rowe Price holds roughly 11 percent of MGM, while holding the largest percentage of shares in Hilton (9.2 percent) and a top ten percentage in Marriott. Vanguard also holds more than 10 percent in MGM and between 6.2 and 9.6 percent in Marriott, Wyndham, and Hilton.
- Capital Research holds roughly 10 to 17 percent of the shares for health insurers UnitedHealth, Humana, and Cigna, while also holding a top ten percentage in Aetna and Anthem.
- In the oil and gas industry, Vanguard holds roughly 12 percent of Marathon and is the largest shareholder for Exxon, Chevron, and Valero, each at roughly 8.3 percent.

Third, whether or not a single investor holds more than 10 percent of competing firms, a small group of the same shareholders often control 20 percent or more of each competitor’s stock. In the pharmaceutical industry, for instance, Vanguard, BlackRock, State Street, and Capital Research together hold between 23 and 25 percent of Pfizer, Johnson & Johnson, and Merck. In the hotel industry, some combination of Vanguard, BlackRock, T. Rowe Price, and Capital
Research hold between 20 and 27 percent of MGM, Hilton, Wyndham, and Marriott. And in the health insurance industry, the top five shareholders, all of which own shares in competitors, hold roughly 25 percent of Aetna, 29 percent of Anthem, 35 percent of Cigna and UnitedHealth, and 43 percent of Humana. Other examples abound.

This reality is potentially significant when one considers how the same phenomenon is impacting competitive analyses in other jurisdictions. In its decision regarding the Bayer-Monsanto merger, for example, the European Commission studied the number of shareholders required to control a meaningful stake—between 20 and 50 percent—of competitor firms, explaining that even “‘passive’ investors acknowledge that they exert influence on individual firms with an industry-wide perspective.” The Commission specifically called out the fact that no more than nine investors were required to control 20 percent of each competitor in the relevant market. It concluded that, “in the presence of common shareholding,” (1) “concentration measures, such as market shares or the Herfindahl-Hirschman index (‘HHI’), are likely to underestimate the level of concentration of the market structure and, thus, the market power of the Parties,” and (2) “common shareholding in these industries are to be taken as an element of context in the appreciation of any significant impediment to effective competition.” It is conceivable—although perhaps not imminent—that similar reasoning will find its way into U.S. antitrust analysis, particularly because it often takes far fewer investors to surpass 20 percent shareholding.

**Conclusion**

As these examples make clear, common ownership—and many of the trends discussed above—arise irrespective of industry. They can be found in heavy industry or the travel industry, as well as in health insurance and household goods. The phenomenon does not discriminate. Thus, while much remains unsettled, this much is clear: the common ownership issue is not going away. Academics and practitioners on all sides of the debate continue to research and publish, and both antitrust agencies have publicly expressed their commitment to examining the phenomenon. Given the speed at which this debate is moving from academia to regulators, it is important to understand and bear in mind the true extent of common ownership and the sprawling implications of any actions against it. Institutional investors, those companies in which they invest, and ordinary Americans should stay tuned.

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6. U.S. Submission on Common Ownership, supra note 1, ¶ 1 n.1 (Passively managed index and exchange-traded funds doubled their assets under management between 2011 and 2014.)
10. U.S. Submission on Common Ownership, supra note 1, ¶ 15 (“Creating across-the-board limitations on common ownership without sufficient evidence of anticompetitive effects could impose unintended real-world costs on businesses and consumers by making it more difficult to diversity risk.”).
18. Elhauge, supra note 7, at 1302.
19. Id. at 1303.
20. Id. at 1305; see also Scott Morton & Hovenkamp, supra note 3, at 2027, 2034.
23. Posner et al., supra note 8, at 670; Scott Morton & Hovenkamp, supra note 3, at 2047; Edward B. Rock & Daniel L. Rubinfeld, Defining the Antitrust Threat to Institutional Investor Involvement in Corporate Governance 30–35.


Id. at 8–11; see also Hemphill & Kahan, * supra* note 9, at 8–9.


Id. at 5.

Id. at 5, 20–27.

Id. at 5–6, 27–29.


Id. at 3–17.


U.S. SUBMISSION ON COMMON OWNERSHIP, supra note 1, ¶¶ 12, 15.

Id. ¶ 3.

Id. ¶ 15. For those reasons, the U.S. antitrust agencies “have not litigated a case involving common ownership by a single institutional investor.” Id. ¶ 3. As one point of reference, European antitrust enforcers have already looked to common ownership when assessing the competitive effects of mergers, noting that “in the context of innovation competition,” common shareholding likely results in “less intense [competition] as compared with an industry with no common shareholding.” See, e.g., Case M.7932—Dow/DuPont, Comm’n Decision, ¶¶ 2348–2352 (Mar. 27, 2017), http://ec.europa.eu/competition/mergers/cases/decisions/m7932_13668_3.pdf (“The presence of significant level of common shareholding tends to lower rivalry”); “as for current price competition, the presence of significant common shareholding is likely to negatively affect the benefits of innovation competition for firms subject to this common shareholding”).


Id.

Id.

Id.


Id. at 5.

Id.

Id.

Id. at 5–6.

Id. at 6, 14.


Id. at 4.

Id. at 12.


Id.

Id.

Letter from Craig J. Lazzara to Fed. Trade Comm’n, * supra* note 39, at 2. This may not be particularly surprising because index funds seek to replicate the performance of benchmarks like the S&P 500 by “owning” portions of all the companies that make up the index.

The data reflects S&P Capital IQ information retrieved on December 5, 2019. Tables of all the data we discuss, and more, can be found in the online Appendix to this article.


The OECD estimates that the three largest institutional investors in any company on average hold 24% of the company’s capital, while the ten largest institutional investors on average hold 43% of the company’s capital. OECD, * supra* note 2, at 23–25.


Id.

In addition to the examples discussed above, we look at a handful of other industries in the online Appendix.